No. 8953

United States
Circuit Court of Appeals
For the Ninth Circuit

PHOENIX BLUE DIAMOND EXPRESS, a Corporation,
Appellant,
vs.
DORRIO MENDEZ,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
LORETO LUNA,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
P. N. ESTRADA, Administrator of the Estate of Jesus Valenzuela, Deceased,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
FELIX LUGO, by his Guardian Ad Litem, Estevan Sworez,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
ANDRES ACUNA, by his Guardian Ad Litem, Delores Acuna,
Appellee.

Brief of Appellant

Upon Appeals from the District Court of the United States for the District of Arizona.

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REPUBLIC AND GAZETTE PRINTERY, PHOENIX

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Upon Appeals from the District Court of the United States for the District of Arizona.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION.

The pleadings are substantially similar in each of the five consolidated cases, originally filed in the Superior Court of Maricopa County, Arizona. The actions are to recover damages for personal injuries and death. It is alleged in four of the complaints that the negligence of appellant was the proximate cause of the personal injuries sustained by the plaintiffs, and, in the fifth, the death of plaintiff's intestate. Damage is demanded in each case in excess of Three Thousand Dollars. (*2-8, 32-39, 45-51, 57-63, and 71-77).

P. N. Estrada was duly appointed administrator of the estate of Jesus Valenzuela, deceased. (45). Estevan Lugo was appointed guardian ad litem of Felix Lugo, a minor. (64). Dolores Acuna was appointed guardian ad litem of Andres Acuna, a minor. (78).

The answer in each case is a general denial. (17-18, 39-40, 52, 65-66, and 79-80).

Each of the five cases was removed from the Superior Court of Maricopa County, Arizona, to the United States District Court for the District of Arizona, upon the ground that each of said actions was a suit of a civil nature; that the value in controversy in each action was in excess of Three Thousand Dollars; and that each of the defendants was a resident of the State of California and a non-resident of the State of Arizona. (9-17, 39, 51, 65 and 79).

*NOTE: Figures in parentheses refer to pages of Transcript of Record.

In each case a petition for removal to the Federal Court; notice of petition for removal to the Federal Court; bond for removal to the Federal Court, duly approved; order for removal to the Federal Court, duly given, made and entered, and notice of removal, were served and filed within twenty days of service of process, the time allowed by Section 3753, Revised Code of Arizona 1928, within which to plead. (9-17, 39, 51, 65, and 79).

United States Code Annotated, Title 28, Section 41, (as amended) confers jurisdiction upon the United States District Court. We quote said section:

> "Section 41 (as Amended). The District Court shall have original jurisdiction as follows: * * * * or, where the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars, and * * * * (b) is between citizens of different states * * * *"

United States Code Annotated, Title 28, Section 71, authorizes removal of the cause from the Superior Court of Maricopa County, Arizona, to the United States District Court for the District of Arizona. We quote said section:

> "* * * * any other suit of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being non-residents of the State * * * *"

United States Code Annotated, Title 28, Section 225 (as amended), confers jurisdiction on appeal upon this Court. We quote said section:

> "The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions————
>
> First. In the District Courts, in all cases save where a direct review of the decision may be heard in the Supreme Court under Section 345 of this Title."

CONCISE ABSTRACT OR STATEMENT OF THE CASE.

An action was commenced against appellant, Phoenix Blue Diamond Express, in the Superior Court of Maricopa County, Arizona, by Dorrio Mendez on January 6th, 1938 (8); by Loreta Luna on January 5th, 1938(39); by P. N. Estrada, Administrator of the Estate of Jesus Valenzuela, deceased, on February 15th, 1938 (51); by Felix Lugo, by his Guardian ad Litem, Estevan Sworez, on February 11th, 1938 (63); and by Andres Acuna, by his Guardian ad Litem, Delores Acuna, on February 11th, 1938 (77). By this action the four plaintiffs, other than plaintiff, P. N. Estrada, Administrator of the Estate of Jesus Valenzuela, deceased, sought to recover damages for personal injuries alleged to have been sustained by them, and P. N. Estrada, Administrator of the Estate of Jesus Valenzuela, deceased, sought to recover damage for the death of Jesus Valenzuela. Each of the five cases were sea-

sonably removed from the Superior Court of Maricopa County, Arizona, to the United States District Court for the District of Arizona, at Phoenix, (9-19, 39, 51, 65, 79), and the record on removal in each case was seasonably filed in said United States District Court (18, 40, 53, 66, 80). Except proper allegations of the representative capacities of the plaintiffs, the complaint in each of the actions was substantially similar. In the complaint, it is alleged that plaintiff is a resident of Maricopa County, Arizona. That defendant, Phoenix Blue Diamond Express, is a corporation organized and existing under the laws of the State of California. (2). It is also alleged that defendant, G. B. Pace, is a resident of California and that he was doing business as Phoenix Blue Diamond Express in the States of California and Arizona, and was a non-resident of the State of Arizona; and that defendant, Joe Smith, is a resident of the State of California. Joe Smith either defaulted or was not served with process in each of the cases and was not concerned in the trial of the cases. A verdict was directed and judgment entered thereon in favor of G. B. Pace and G. B. Pace, doing business as Phoenix Blue Diamond Express. (2, 21-23, 42-44, 54-56, 68-70, and 87-89).

In the complaint, other material allegations are that appellant, during all of the times mentioned in the complaint, was engaged in the trucking business for hire and owned and possessed a 1937 International Truck and Semi-Trailer; that at the time of the accident, defendant, Joe Smith, was the agent

and employee of appellant, Phoenix Blue Diamond Express, and was in actual possession, control and management of said truck and was then and there driving and operating same in the business of appellant and in the course and scope of his employment as such agent and employee. (3).

In said complaint, it is further alleged that Washington Boulevard is a paved highway, extending in an easterly direction from the City of Phoenix; that the accident occured upon said Boulevard approximately five blocks in an easterly direction from where Washington Boulevard intersects with 24th Street in Phoenix, Maricopa County, Arizona, and from said point, said Washington Boulevard is straight for more than four miles in an easterly direction and for more than three miles in a westerly direction. (3, 4).

In said complaint, it is also alleged that on the first day of January, 1938, at about the hour of 1:50 o'clock in the morning of said day, plaintiff, or plaintiffs intestate, as the case may be, was riding in an automobile driven by Loreta Luna, and proceeding at a speed not in excess of thirty miles per hour, on the southerly portion of, and in an easterly direction upon, Washington Boulevard at the place where the accident occurred; that at the place of the accident Washington Boulevard is level, with no obstructions to prevent approaching cars and trucks from seeing and observing the car in which plaintiff, or plaintiff's intestate, was riding; that defendant, Joe Smith, then and there operating said

International Truck in a westerly direction and approaching the car in which plaintiff, or plaintiff's intestate, was riding, did then and there willfully, wantonly and so grossly and negligently manage and control said International Truck at said time and place as to cause the same to be run upon and against the front portion of said automobile in whch plaintiff, or plaintiff's intestate, was riding, causing said truck and semi-trailer to collide with said automobile in which plaintiff, or plaintiff's intestate, was riding, with great force and violence. (4, 5).

In said complaint it is further alleged that the injuries sustained by plaintiffs and the death of Jesus Valenzuela were caused solely and wholly by the negligence of appellant, consisting, among other things, of the following: high and negligent rate of speed; truck and semi-trailer operated to the left of the middle line of Washington Boulevard and over upon a part of the highway upon which the car in which plaintiff was riding was being driven; that defendant, Joe Smith, was under the influence of intoxicating liquor; that Joe Smith failed to keep said truck and semi-trailer under proper and reasonable control; that defendant, Joe Smith, willfully, wantonly and negligently so operated said truck and trailer at an excessive and careless rate of speed greater than would permit him to operate and exercise proper control of said truck and trailer, and to decrease its speed and to control same in order to avoid colliding with the automobile in which plain-

tiff, or plaintiff's intestate, was riding; that Joe Smth willfully, wantonly and negligently failed to keep a lookout ahead for approaching cars and more particularly, for the car in which plaintiff, and plaintiff's intestate, were riding; that Joe Smith failed to keep a lookout for danger to be reasonably apprehended or to observe or heed the approaching cars upon said highway without having due regard for the width, traffic and surface conditions of said highway; that Joe Smith willfully, wantonly and negligently operated said truck and semi-trailer upon the southerly portion of said highway at which time Smith was not then and there attempting to pass an automobile proceeding in the same direction upon the north side of said highway; and Joe Smith did willfully, wantonly, grossly and negligently operate said truck and trailer without taking any reasonable precautions, or any precautions at all, to avoid colliding with the car in which plaintiff, and plaintiff's intestate, were riding. (5 and 6).

In said complaint injuries are alleged to have been sustained by four of the plaintiffs and death of Jesus Valenzuela as the proximate cause of the alleged negligence of appellant. Special damages are alleged by way of expenses for hospitalization, medicine and doctors' services, and in the case of Jesus Valenzuela, burial expenses. It is also alleged that the four plaintiffs and deceased were in the exercise of due care and were free from any negligence at the time of the accident and injury. (7, 8).

The prayer is for general, special and punitive damages.

The answer of appellant to each complant is a general denial. (17-18, 39-40, 52-53, 65-66, and 79-80).

It may be here stated that appellant does not deny that plaintiffs sustained injuries as a result of the accident and that Jesus Valenzuela was killed in consequence of the accident, nor it it asserted on this appeal that the verdicts and judgments are excessive.

The five cases were consolidated and tried together before a jury.

A verdict was returned in favor of each of the plaintiffs, upon which judgment was entered. (20-21, 41-43, 53-54, 67-68, 86-87).

In each of the five cases so consolidated and tried, appellant has appealed to this Court. (23-32, 44, 56, 70, 95).

At the conclusion of the testimony of J. W. Gandee, called under the Arizona statute for cross examination by the plaintiff, the Court, at the request of counsel for appellant, and without objection by the counsel for appellees, directed the order of proof requiring appellees and appellant to submit all their evidence upon the question of agency. (124).

After the appellant and appellees each rested their case upon the issue of agency and scope of employment, appellant moved the Court for a directed verdict in favor of the defendant, Phoenix Blue Diamond Express, a corporation, G. B. Pace, an

individual, and G. B. Pace, dba Phoenix Blue Diamond Express, on the grounds that there was no showing of agency or operation of the truck at the time of the accident within the scope of agency or within the course or scope of employment. The motion being denied, each of the defendants excepted thereto. (167-168).

The trial of the cases on other issues was resumed and continued and all such evidence related wholly and exclusively to issues other than the question of agency and scope of employment, and is not material and has no bearing upon, and does not affect, any issue presented under Assignments of Error filed herein in connection with this appeal of the five consolidated actions. (168).

At the close of all of the plaintiffs' evidence and after plaintiff had rested its case, the defendant thereupon moved the Court for a directed verdict in favor of defendant, Phoenix Blue Diamond Express, a corporation, G. B. Pace, an individual, and G. B. Pace, dba the Phoenix Blue Diamond Express, upon the grounds that all of the evidence disclosed that the truck at the time of the collision was being operated not in the business of either of the moving defendants and outside of the scope of employment of Joe Smith, or whoever may have been driving the truck, and the evidence showed a departure from any scope of employment. The motion asked for a directed verdict as to each of the defendants separately upon the same grounds and for the two defendants other than Phoenix Blue Diamond Express, a cor-

poration, upon the further ground that as to G. B. Pace, individually, and as to G. B. Pace, alleged to be doing business as the Phoenix Blue Diamond Express, that there was no evidence that Pace was doing business as the Phoenix Blue Diamond Express, and that the appellees had introduced in evidence a lease in writing showing that Pace divested himself of all control over the operation of the truck involved in the accident. The motion was granted as to the defendant, G. B. Pace, dba Phoenix Blue Diamond Express, and accordingly a verdict was directed in favor of G. B. Pace, dba Phoenix Blue Diamond Express. The motions being denied as to Phoenix Blue Diamond Express, a corporation, and G. B. Pace individually, each of said defendants excepted thereto. (168-169).

Whereupon, evidence was introduced on behalf of appellant upon issues other than agency and scope of employment. All such evidence related wholly and exclusively to issues other than agency and scope of employment and is not material and has no bearing upon, and does not affect, any issue presented under Assignments of Error filed herein in connection with the appeal of the five consolidated cases.

At the conclusion of the introduction of such evidence, appellees and appellant each rested their case. (169).

Whereupon, appellant, Phoenix Blue Diamond Express, a corporation, moved the Court for a directed verdict in its favor upon the grounds that the evidence wholly failed to establish or prove agency

between the operator of the truck at the time of the collision and the Phoenix Blue Diamond Express, a corporation, or the operation of the truck at the time of the collision within the scope of employment, and that the truck was not being operated at the time of the collision in the business of defendant, Phoenix Blue Diamond Express, a corporation, and was then being operated outside of the scope of employment of Joe Smith, or whoever may have been driving the truck, and that there was a material and clear departure in the operation of the truck from any scope of employment. Said motion being denied, the Phoenix Blue Diamond Express, a corporation, excepted thereto. (169-170).

Thereupon, the case was argued to the jury by counsel for appellant and by counsel for appellees, at the conclusion of which the Court instructed a verdict in favor of G. B. Pace, as an individual, and G. B. Pace, doing business as Phoenix Blue Diamond Express, a corporation, and further charged the jury. (170-171).

Thus is presented Assignment of Error No. 3, (97) specification of errors No. 1. The question is whether or not there was any evidence on the question of agency or scope of employment authorizing or permitting the submission of such issue to the jury.

The appellant, prior to the Court's charge to the jury and prior to argument of counsel, and at the time provided by the Rules of the United States District Court for the District of Arizona, presented to the Court, and requested the Court to give to the

jury, written instructions Nos. 3 and 9, mentioned and referred to in the Exceptions of appellant to the charge. The Court refused to give the requested instructions. Thus, assigned errors Nos 4, (98) and 5, (98) arose. Specification of errors No. 2 and No. 3.

The assigned error No. 4, specification of errors No. 2, presents the Court's refusal to give requested instructions No. 3:

> "You are directed to return a verdict in favor of Phoenix Blue Diamond Express, a corporation." (183).

It may be noted that Assignment of Errors No. 4, specification of errors No. 2, in another way raises and presents the same question as is presented by Assignment of Errors No. 3, specification of error No. 1.

Assignment of Error No. 5, specification of error No. 3, presents the asserted error of the Court in refusing to give requested instruction No. 9:

> "You are instructed that no fact or circumstances nor any testimony tending in any degree to impeach Joe Smith, provides any positive evidence at all against defendant. Such impeaching evidence neither establishes nor tends to establish any fact in this case but its only effect may be to impeach or destroy the testimony of Joe Smith. In other words, its only effect was on the credibility of the testimony of Joe Smith and at most, it only entitles you to wholly disregard the affirmative testimony of Joe Smith but would not authorize you to consider impeachment evi-

dence as affirmative evidence that Joe Smith was at the time of the accident using and operating the truck involved in the accident in the business of defendant. The greatest possible effect *of* impeachment evidence could have so far as defendant is concerned was to leave the case just exactly as though Joe Smith had not testified. Otero vs. Soto, 267 Pac. 947; 34 Ariz. 87." (183-184).

Counsel for appellant excepted to the Court's refusal to give requested Instructions Nos. 3 and 9. (182).

The error presented by Assignment of Errors No. 6, specification of errors No. 4 arose during the course of the trail and immediately after the Court had finished his charge to the jury and appellant had noted exceptions to the Court's refusal to give requested Instructions Nos. 3 and 9 in consequence of the following occurrence:

"The Court: After you retire to your jury room, gentlemen, you will select one of your number to act as foreman.

Juror Ford: Can I ask you a question?

The Court: All right, what is it?

Juror Ford: In case the jury finds that the truck was driven by any one other than Joe Smith, what would be your instructions as to the liability of the defendant?

The Court: Well, you take that up with the other jurors.

Juror Ford: Sir?

The Court: You haven't found anything yet. Wait until you get into your jury room.

Juror Ford: All right.

The Court: How do you know that the jury will find that? There will be five forms of verdict submitted, one in each case, gentlemen, one for the defendant and one for the plaintiff in each case. In the event your verdict is for the defendant, you will sign that form of verdict. In the event your verdict will be for the plaintiff you will insert the amount of damages you find and have that verdict signed by your foreman. Your verdict, of course, must be unanimous.

To the Court's refusal to answer question asked by Juror George O. Ford, the defendant, Phoenix Blue Diamond Express, a corporation, excepted." (182-183).

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON BY APPELLANT.

I.

Assignment of Errors No. 3 (97-98).

The Court erred in denying the motion of defendant, Phoenix Blue Diamond Express, a corporation, for a directed verdict in its favor upon the grounds that the evidence wholly failed to establish or prove agency between the operator of the truck at the time of the collision and the Phoenix Blue Diamond Express, a corporation, or operation of the truck at the time of the collision within the scope of employment, and that the truck was not being operated at the time

of the collision in the business of defendant, Phoenix Blue Diamond Express, and was then being operated outside of the scope of the employment of Joe Smith, or whoever may have been driving the truck, and that there was a material and clear departure in the operation of the truck from any scope of employment.

Such motion was made and denied first, at the close of the evidence on the questions of agency and scope of employment, again, at the close of plaintiff's case and also, after all evidence had been introduced and both plaintiff and defendant had rested their case. (97-98).

II.

Assignment of Errors No. 4 (98).

The Court erred in refusing to give an instruction requested by the defendant, Phoenix Blue Diamond Express, a corporation, as follows:

> "You are directed to return a verdict in favor of Phoenix Blue Diamond Express, a corporation." Or any like instruction. (98).

III.

Assignment of Errors No. 5 (98-99).

The Court erred in refusing to give an instruction requested by defendant, as follows:

> "You are instructed that no fact or circumstances nor any testimony tending in any degree to impeach Joe Smith, provides any positive

evidence at all against defendant. Such impeaching evidence neither establishes nor tends to establish any fact in this case but its only effect may be to impeach or destroy the testimony of Joe Smith. In other words, its only effect was on the credibility of the testimony of Joe Smith and at most, it only entitled you to wholly disregard the affirmative testimony of Joe Smith but would not authorize you to consider impeachment evidence as affirmative evidence that Joe Smith was at the time of the accident using and operating the truck involved in the accident in the business of defendant. The greatest possible effect of impeachment evidence could have so far as defendant is concerned was to leave the case just exactly as though Joe Smith had not testified. Otero vs. Soto, 267 Pac. 947; 34 Ariz. 87."

Or any like instruction. (98-99).

IV.

Assignment of Errors No. 6 (99).

The Court erred in not answering the question asked the Court by Juror Ford: In case the jury finds that that truck was driven by anyone other than Joe Smith, what would be your instructions as to the liability of the defendant? (99).

SUMMARY OF ARGUMENT.

The evidence was insufficient to justify the submission of the question of agency and scope of employment to the decision of the jury in that the affirmative evidence established that the truck at the time of the collision was being used for a joy ride. A verdict should have been directed for appellant.

Brief Pages 18-51.

The law to be applied is the law of the State of Arizona as declared in decisions of the Supreme Court of Arizona.

Brief Pages 19-20.

Erie Railroad Co., Petitioner vs. Harry J. Tompkins, 304 U. S. 64, 82 L. Ed. 787.

Presumption from use and control of motor vehicle as evidence.

Brief Pages 22-23, 30.

Otero vs. Soto, 34 Ariz. 87, 267 Pac. 947;
Peters vs. Pima Mercantile Co., Inc., et al.,
42 Ariz. 454, 27 Pac. (2d) 143.

Presumption arising from proof of use or control will not raise an issue of fact in the face of evidence that cannot be legally disregarded.

Brief Pages 22-23.

Otero vs. Soto, 34 Ariz. 87, 267 Pac. 947.

Uncontradicted evidence cannot be disregarded except upon the ground of inherent improbability as

to its accuracy or where there may be circumstances which satisfy the Court of its falsity.

Brief Pages 24-25.

Otero vs. Soto, 34 Ariz. 87, 267 Pac. 947.

Impeachment evidence never affirmative evidence.

Brief Pages 26-27.

Otero vs. Soto, 34 Ariz. 87, 267 Pac. 947.

Owner not liable for negligence of employee operating motor vehicle without knowledge or permission and for a purpose other than that for which he was employed.

Brief Pages 27-29-30.

Peters vs. Pima Mercantile Co., Inc., et al.,
42 Ariz. 454, 27 Pac. (2d) 143.

Evidence overcomes presumption arising from ownership.

Brief Pages 30-32.

Peters vs. Pima Mercantile Co., Inc., et al.,
42 Ariz. 454, 27 Pac. (2d) 143.

A directed verdict is proper where departure is marked and unusual.

Brief Pages 32-34.

Peters vs. Pima Mercantile Co., Inc., et al.,
42 Ariz. 454, 27 Pac. (2d) 143.

Employee returning to point of departure not on business of employer within scope of employment.

Brief Pages 34-35.

Peters vs. Pima Mercantile Co., Inc., et al.,
42 Ariz. 454, 27 Pac. (2d) 143.

Employer not liable for negligence of employee in performance of acts outside of his employment though such acts benefit employer.

Brief Pages 35-36.

Peters vs. Pima Mercantile Co., Inc., et al.,
42 Ariz. 454, 27 Pac. (2d) 143.

Negative testimony is not sufficient to raise an issue of fact or prevail against positive and unimpeached affirmative testimony.

Brief Pages 36-37.

Canion vs. So. Pac. Co., (————Ariz., not yet reported), 80 Pac. (2d) 397;
Davis vs. Boggs, 22 Ariz. 497, 199 Pac. 116;
Ill. Bankers' Life Assn. vs. Theodore,
44 Ariz. 160, 34 Pac. (2d) 423;
So. Pac. Co. vs. Fisher,
35 Ariz. 87, 274 Pac. 779.

Appellees' evidence established only that G. B. Pace was owner of the truck and trailer involved in the collision; that he hired and paid Joe Smith to drive the truck, and leased the truck and trailer to appellant with the driver furnished; that the truck and trailer was leased, to be used in the common carrier business of appellant, and that the collision occurred on a highway usually travelled by appellant in conducting its business, and the truck and trailer was partially loaded with freight being transported in interstate commerce by appellant.

Brief Pages 38-41.

Appellant's affirmative evidence established that the truck was not being driven by Joe Smith or any person in the employ of appellant and was being used for a mission personal to those operating the same, viz., a New Year's Eve joy party.

Brief Pages 41-50.

Instruction requested by appellant on effect of impeachment evidence, viz.: that the greatest possible effect of impeachment evidence could have, so far as appellant is concerned, was to leave the case just exactly as though Joe Smith had not testified.

Brief Pages 51-52.

Otero vs. Soto, 34 Ariz. 87, 267 Pac. 947.

It is the duty of a Court to answer any pertinent question of a juror. The Court should have advised Juror Ford that unless Joe Smith was driving the truck at the time of the collision, in no event is appellant liable.

Brief Pages 52-55.

ARGUMENT

Specification of Errors Nos. I and II will be argued together. Specification of errors No. I is as follows:

> The Court erred in denying the motion of defendant, Phoenix Blue Diamond Express, a corporation, for a directed verdict in its favor upon the grounds that the evidence wholly failed to establish or prove agency between the operator of the truck at the time of the collision and the Phoenix Blue Diamond Express, a corporation, or operation of the truck at the time of the collision within the scope of employment, and that the truck was not being operated at the time of the collision in the business of the defendant, Phoenix Blue Diamond Express, and was then being operated outside of the scope of the employment of Joe Smith, or whoever may have been driving the truck, and that there was a material and clear departure in the operation of the truck from any scope of employment.
>
> Such motion was made and denied first, at the close of the evidence on the questions of agency and scope of employment, again, at the close of plaintiff's case and also, after all evidence had been introduced and both plaintiff and defendant had rested their case." (97).

Specification of Errors No. II is as follows:

> "4. The Court erred in refusing to give an instruction requested by the defendant, Phoenix Blue Diamond Express, a corporation, as follows:

'You are directed to return a verdict in favor of Phoenix Blue Diamond Express, a corporation.' Or any like instruction." (98).

These specifications of error present the question of the sufficiency of the evidence to justify the submission of the question of agency and scope of employment to the decision of the jury. In other words, they present the question of whether or not appellant's motion for a directed verdict should have been granted. It is the view of appellant in each of the five cases, that a verdict in its favor should have been directed. Before discussing and specifically drawing attention to the evidence on the issues under consideration, we deem it advisable to bring to the attention of the Court, pertinent decisions of the Supreme Court of Arizona, which, since the decision of the Supreme Court of the United States in the case of Erie Railroad Company, Petitioner, v. Harry J. Tompkins, (decided April 25, 1938), 304 U. S. 64, 82 L. Ed. 787, are controlling upon this Court. Decisions of this Circuit and of other Circuits, relied upon by appellees in the trial court and which doubtless were persuasive to the trial Judge, are at variance with the decisions of the Supreme Court of Arizona. Since such decisions are no longer controlling or even properly effectual for any purpose, and since Arizona decisions are available upon the questions under discussion, we shall confine ourselves to a review of the Arizona decisions other than the reference made to Erie v. Tompkins, supra, and to observe that this decision was handed down April 25, 1938, after but during the same month

of the trial of the instant cases and, therefore, it is but fair to assume that the trial Judge was properly controlled and persuaded by the decisions from the Circuit Courts of Appeal, including this Circuit, in the decision of the instant cases.

In Erie v. Tompkins, the doctrine of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1842), was overturned. The Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

After quoting Mr. Justice Holmes from Kuhn v. Fairmont Coal Company, 215 U. S. 349, 370-372, 54 L. Ed. 228, 238-239, the Court said:

> "Thus the doctrine of Swift v. Tyson is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' In disapproving that doctrine we do not hold unconstitutional Section 34 of the Federal Judiciary Act of 1789, or any other Act of Con-

gress. *We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.*"

The case of Otero vs. Soto, 34 Ariz. 87, 267 Pac. 947, was decided by the Supreme Court of Arizona June 11th, 1928. We quote extensively from the opinion since it cogently discusses the precise questions under consideration in the instant case. We quote from Arizona Report:

Statement of the Case and Pertinent Evidence.

"This is an action for damages brought by Hector Soto against Teofilo Otero and Francisco Rojas. It is founded upon an injury received by plaintiff through a collision with a Ford truck, driven by Rojas and owned by Otero. Otero is the owner of a ranch in Santa Cruz county, and for several years prior to the accident Rojas had lived at the ranch, working for Otero. He was employed by the day and was not required or expected to work upon Sundays. At the time of the accident, Otero, was, and had been for some time, in the state of California. About five o'clock Sunday, July 25th, 1926, Rojas, without the knowledge or consent of Otero, started for Nogales in a Ford truck belonging to the latter, having invited two other young men to accompany him. When they were within about ten miles of Nogales, engine trouble occurred, and the truck stopped. Another car came along shortly, and the truck was fastened behind it with some fence wire, and the parties proceeded toward Nogales, Rojas guiding the truck, which was being towed by the other car.

Plaintiff and his brother-in-law were returning from Nogales to Tucson on a motorcycle, and, while attempting to pass the two automobiles, an accident occurred, which resulted in Soto's receiving a broken leg.

The case was tried to a jury, which returned a verdict against both defendants in the sum of $12,500, and they have brought the matter before us for review." (P. 88-89).

The case was decided upon the assignment of error that the Court erred in denying Otero's motion for an instructed verdict.

Plaintiff's Theory of the Case.

"It is plaintiff's theory that Rojas, Otero's employee, was at the time of the accident using the car in his employer's business, and that the latter is therefore liable for the negligence of Rojas." (P. 89).

Defendant's Theory of the Case.

"It is Otero's theory, on the other hand, that Rojas was using the car for the purpose of his own pleasure, and in no way upon Otero's business, and the latter is therefore not responsible for the accident." (P. 89).

Ownership of Car as Evidence.

"There is no direct evidence in the case, so far as Otero is concerned, that the car was being used in or about his business. Soto, however, relies upon the rule of law that proof of the fact Otero owned the automobile which caused the injury was *prima facie* evidence that the vehicle

was being driven for him, and in his business." (P. 89-90).

The Court quotes from the Arizona case of Baker vs. Maseeh, 20 Ariz. 201, 179 Pac. 53, and from the Alabama case of Tullis vs. Blue, 216 Ala. 577, 114 South. 185, to the general effect that proof of ownership of a motor vehicle makes out a prima facie case; and further quotes:

" 'The presumption of use and control arising from proof of ownership is not conclusive. It has the effect, however, to cast the burden of proof on the owner to show, if he can, that the negligent driver was not his servant or agent, or, if such servant or agent, he was not at the time using the vehicle in the business of the owner.' " (P. 90).

Presumption Arising from Proof of Ownership Will Not Raise an Issue of Fact in the Face of Evidence That Cannot Legally Be Disregarded.

"If, therefore, there be evidence in the case that the truck was not being used in Otero's business, which on the record as it stands cannot legally be disregarded, the presumption alone cannot be considered to raise an issue of fact which would cause the case to go to the jury, and under such circumstances it would be the duty of the court to instruct the jury to return a verdict in favor of Otero. If, on the other hand, even though there be no affirmative evidence supporting the presumption, the evidence contradicting it is of such a nature that it could be legally disregarded, the presumption would be sufficient to take the question of use to the jury." (P. 91).

When Uncontradicted Testimony May Be Disregarded.

"We have discussed the right of the jury to disregard uncontradicted testimony in the case of *Crozier* v. *Noriega,* 27 Ariz. 409, 233 Pac. 1104, wherein we quote approvingly from *Davis* v. *Judson,* 159 Cal. 121, 113 Pac. 147, as follows:

> 'While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy.'

In other words, if any circumstances appear in the case which would justify a reasonable man in discredting the statement of a witness,

the jury may refuse to believe it, even though it is not directly challenged, but they may not arbitrarily reject uncontradicted evidence when nothing intrinsic in the evidence itself or extrinsic in the circumstances of the case casts suspicion thereon.

In the case cited, we held that there was affirmative evidence in the case which would justify the jury in disregarding the testimony of witnesses who were not *directly* contradicted. What is the situation in the case at bar?'' (P. 91-92).

Application of Facts to the Law

''Defendant Rojas was called by plaintiff for the purpose of examination under the statutory provision allowing such action. He testified that his sole purpose in taking the car that afternoon was for a pleasure ride, in company with the witnesses Salcido and Gutierrez. He was then asked whether he had not previously made a written statement to the effect, 'The purpose for which I was coming to Nogales was to have repairs made to the truck.' He admitted making the statement, but did not admit on the stand that it was true, but, on the contrary, claimed it to be false. Counsel for Otero objected to any evidence regarding the previous statement, and the court admitted the evidence solely for the purpose, as stated at the time, of impeachment of Rojas as to his credibility, and not as positive evidence against Otero. This ruling was unquestionably correct. While the alleged admission of Rojas, if material, was evidence against him, it could in no way be

affirmative evidence against his co-defendant, Otero. 22 C. J. 349. Its only effect, so far as the latter was concerned, was on the credibility of the testimony of Rojas and at most would only entitle the jury to disregard the affirmative testimony of the latter *in toto,* but would not authorize them to consider the statement as affirmative evidence that he was at the time using the truck in his employer's business. In other words, the greatest effect it could have had, so far as Otero was concerned, was to leave the case as though Rojas had not testified at all. The witnesses Salcido and Gutierrez, who went with Rojas on the trip, both testified positively that it was a pleasure trip only. Their testimony was not impeached or contradicted in the slightest degree. There was nothing to show that they were in any way biased or influenced in favor of Otero, nor was there any circumstance appearing in the case which would justify a reasonable man in refusing to accept their evidence as to the purpose of the trip. This takes their testimony out of the exception to the rule laid down in *Crozier* v. *Noriega, supra,* and the jury was not justified in disregarding their statements upon this point. Such being the case, the presumption was overcome and there was no issue of fact on the matter to submit to the jury, so far as Otero was concerned." (P. 92-93).

Impeachment Evidence Never Affirmative Evidence. Its Effect.

"It is obvious from this that the trial court must have considered the previous declarations of Rojas as affirmative evidence to submit to

the jury in support of the claim that he was engaged in Otero's business. This was error. The impeachment of a witness only serves one purpose, and that is to enable the jury to properly evaluate the credibility of the witness. Under no circumstances can it add anything of *affirmative* value to the case of the adversary. Its greatest possible effect in this case, so far as Otero was concerned, was to eliminate the testimony of Rojas, leaving that of Salcido and Gutierrez unimpeached.

The verdict against Otero was thus unsupported by any evidence that the car was being employed in the latter's business, and the presumption of use was rebutted by the unimpeached testimony of Salcido and Gutierrez. Since either evidence of use or an unrebutted presumption thereof was essential to the plaintiff's case against Otero, the court erred in not instructing a verdict in favor of the latter." (P. 94).

In the case of Peters v. Pima Mercantile Co. Inc., et al, 42 Ariz. 454, 27 Pac. (2d) 143, decided by the Supreme Court of Arizona November 27th, 1933, the Court again had under consideration like questions to those involved on this appeal. The trial court directed a verdict for the Pima Mercantile Company at the close of the evidence. An appeal was taken by the plaintiff. We quote from the opinion:

Statement of the Case and Pertinent Evidence

"It discloses that the Pima Mercantile Company is a corporation doing a general mercan-

tile business at Marana, Arizona, a place on the Casa Grande highway, twenty-three miles west of Tucson; that the president of the company, J. J. McNeil, manages the business, and his son, Sidney McNeil, a young man about twenty years of age, is employed by the company to work in the store and do anything around the place, including the driving of the Company's truck; that on July 9, 1931, the father sent Sidney to Tucson in a truck belonging to the Company for merchandise for the store and that after reaching the wholesale district of the city where he was to get the articles he had gone for and placing a part of them in the truck, he drove to the Veterinary Hospital of Dr. Hicks, some twenty-four or twenty-five blocks from that point, to see about a dog he had taken there some days before for treatment; that he found the dog in a condition to be taken away and after placing it in the truck he started back to the wholesale district to pick up the remainder of the merchandise to take out to Marana; that when he had reached a point a block or so from the hospital the truck he was driving and that of appellant collided, the result being that appellant was injured and later brought this action to recover the damages suffered by him in the accident.

It appears further that the trip from the wholesale district to Dr. Hicks' hospital to obtain the dog was taken without any knowledge the part of J. J. McNeil, the manager of the store, whose only instructions to Sidney before he left for Tucson that day were to go there and bring back certain articles of merchandise, no

reference whatever being made to the dog which he, through permission of his father, had taken to the hospital in the latter's private car sometime prior to July 9th after the close of business for that day. The dog belonged to a nine-year old boy at Marana, whose parents were customers of the store but, according to J. J. McNeil, not very good ones. His father had been section foreman but was then laid off and through permission of the Railroad Company the family was living in the station at Marana to save rent. The road traveled by Sidney that day to Tucson and its wholesale district was the one usually taken by him in going there for merchandise." P. 145).

Owner Not Liable for Negligence of Employee Operating Motor Vehicle Without Knowledge or Permission and for a Purpose Other Than That for Which He was Employed.

"It is clear from these facts that his mission to Tucson that day was to procure certain articles of merchandise for the store and take them to Marana in the truck, and, this being true, it becomes plain that in taking the trip to the hospital for the dog he was not doing what he was instructed to do, but for that period of time stepped aside from his employment to perform an independent act of his own in no way connected with the work he had been directed by his employer to perform. And since he was not acting for his employer but for himself during that period, he and not the former was liable for any damage he might have caused a third person by negligently running into his car. 'The owner of an automobile,' to use the lan-

guage of 2 R.C.L. 1199, par. 33, 'is not liable to one who is injured by the negligence of his chauffeur while operating the machine without his knowledge or permission, and for a purpose other than that for which he was employed, as where the driver is on an errand personal to himself, or is making a detour for his own purposes.' In Danforth v. Fisher, 75 N.H. 111, 71 A. 535, 536, 139 Am. St. Rep. 670, 21 L. R. A. (N.S.) 93, the court said:

> 'In this state the test to determine whether a master is liable to a stranger for the consequences of his servant's misconduct is to inquire whether the latter was doing what he was employed to do at the time he caused the injury complained of. If he was, the fact that he was not doing it in the way expected is immaterial. Rowell v. Railroad, 68 N.H. 358, 44 A. 488. But, if at the time he did the act which caused the injury he was not acting within the scope of his employment, the master is not liable.' " (P. 145-146).

Numerous authorities are cited.

Evidence Overcomes Presumption Arising from Ownership.

"While it is true that when it appeared from the testimony in behalf of appellant that the truck was owned by appellee and that Sidney was employed by it to do anything around the store, including the driving of the truck, there arose the presumption that he was acting within the scope of his employment, Guthrie v. Holmes,

272 Mo. 215, 198 S. W. 854, Ann. Cas. 1918D, 1123, this was only prima facie so and the force thereof was completely overcome when the testimony of J. J. McNeil and his son disclosed that the latter was not following his instructions to go to the city and get the merchandise when he made the side trip of about two miles to the hospital to see about the dog. Dowdell v. Beasley, supra. *The only way appellee could be held liable under such circumstances would be to hold that the law is that the mere fact that Sidney's employment covered the driving of the truck, or that he was in possession of and using it when it caused the injury to appellant, or both, is all that is necessary to make appellee responsible for his acts. To do this, however, would be to overlook entirely the essential factor that the employee must be prosecuting the work he was engaged to perform before his employer becomes liable for injuries his negligent use of his employer's car causes a third person.* Northup v. Robinson, 33 R. I. 496, 82 A. 392. In Sweeden v. Atkinson Improvement Co., supra, the court said:

> 'The mere fact that he was in the service generally of the master, or that the servant was in possession of facilities afforded by the master in the use of which the injury was done, would not make the act attributable to the master. The act must have been done in the execution of the service for which he was engaged. And if the servant steps aside from the master's business to do an independent act of his own and not connected with his master's business then the

relation of master and servant is for such time, however short, suspended; and the servant while thus acting for a purpose exclusively his own is a stranger to his master, for whose acts he is not liable.' " (P. 146).

Where Departure Marked and Unusual, a Directed Verdict Is Proper.

"Appellant contends that the question, whether the son in going to the hospital for the dog was engaged in furthering the work of his employer, is so close that it cannot as a matter of law be said that he was not, and, therefore, that the jury should have been permitted to pass upon it. Where the deviation from instructions is slight and not unusual the court may determine the employee was still about his employer's business and submit the case to the jury, and where the deviation is marked and unusual it may determine that he was not on the business for his employer and direct a verdict. Jackson v. De Bardelaben, 22 Ala. App. 615, 118 So. 504. However, as we view the evidence, Sidney's departure from his instructions was so complete that the court was justified in holding as a matter of law that he was not following his employer's business. He was directed to go to Tucson and bring back the merchandise and this meant perhaps to go and return promptly, since the weather was hot and one of the articles he was to bring back was meat. In the face of these instructions, to leave the wholesale district of the city after procuring part of the merchandise, oranges, and go twenty-four blocks in a different direction to the hospital and return, on an errand in no way connected with his trip to the

city, constituted, as we view it, a deviation from his instructions so marked that it cannot with any fairness or accuracy be said he was during that period serving his employer. This is in line with the views expressed in Johnston v. Hare, 30 Ariz. 253, 246 P. 546, 547. In that case the owner of a car had directed his cousin to take it to the garage only a short distance away but instead of doing so he went on an errand of his own some thirteen blocks out of the way and while driving this extra distance ran into another car and caused the injury upon which the action was based. The court instructed a verdict for the defendant upon the ground that the evidence did not show any liability on his part, and in disposing of the matter on appeal this court said:

> 'But, under all the evidence Sanders' agency was limited to taking defendant's car back to the garage. When he failed to do that and instead appropriated the car to go on an errand of his own, for his own pleasure and business, his agency ceased, and he no longer was acting for defendant. * * * It is fundamental that a principal is not liable for all torts of his agent but only for those committed while the agent is acting within the limits of his agency. * * * Neither can it be presumed that Sanders drove defendant's car to McKinley street and Sixth avenue with the consent, knowledge or authority of defendant, when all the evidence is to the effect that he was delegated by defendant to take it to the garage; or that Sanders was using the car at the time of the accident for the business, purpose, or pleasure

of defendant, when all the evidence is that he was using it for his personal pleasure.' " (pp. 146-147).

Employee Returning to Point of Departure Not on Business of Employer Within Scope of Employment.

"If the hospital had been so situated that Sidney could have reached it on his way to or from the city by taking a road he did not customarily travel but not much out of the way, a different situation would have been presented. *But the suggestion that the accident occured while he was engaged in the employer's business because it happened after he had procured the dog and was on his way back to the wholesale district to get the remainder of the merchandise is without merit.* While there are some decisions upholding this view, for instance, Glass v. Wise & McAlpin, 155 La. 477, 99 So. 409, the great weight of authority is to the contrary, and, in our view, correct, for there is no reasonable basis for the position that the return portion of the trip to the hospital rests upon any different ground than the 'going' part of it. Curry v. Bickley, 196 Iowa, 827, 195 N. W. 617; Crady v. Greer, 183 Ky. 675, 210 S. W. 167; 42 C. J. 1112, par. 871, and citations in note 78. The entire trip was a complete departure from his employment, one way just as much as the other, and it was necessary that he return to the point where he ceased to perform his duty, the wholesale district of the city, before it could be properly said that he had resumed the service of his employer. Orris v. Tolerton & Warfield Co., 201 Iowa, 1344, 207 N. W. 365; Anderson v.

Nagel, 214 Mo. App. 134, 259 S. W. 858. *The fact that part of the merchandise was in the truck when the accident occurred did not make the trip to the hospital other than a personal one; he was instructed to bring the merchandise to Marana, not to take it to the hospital.*" (P. 147).

Employer Not Liable for Negligence of Employee in Performing Acts Outside of His Employment Though Such Acts Benefit Employer.

"To show that Sidney was engaged in his employer's business when going for the dog, however, appellant relies chiefly upon the contention that the evidence discloses that the parents of the dog's owner were customers of appellee's store and that his act had the effect of building up good will for the business. There is nothing in the evidence from which such a conclusion may be drawn. While the boy's parents did occasionally buy articles at the store the elder McNeil testified that they were not good customers, and no fact was disclosed that would suggest that the taking of the dog to the hospital was prompted by a desire to benefit the store, or that the act of kindness should be attributed to any motive other than that of the humane instincts of the McNeils. That Sidney did not do it for the purpose of promoting the Company's interests would seem to be indicated by the fact that the record fails to disclose that any act had theretofore transpired that would have led him to feel that he could make the trip to the hospital on the Company's time or return the dog to its owner in the Company's truck. He had taken

it there after the close of business for the day and in his father's private car, not on Company time or in a Company truck, facts that bring to mind but one thought and that is that the dog was to be returned to its owner in the same way; certainly they did not imply that it might be taken back during business hours and in a different car. Under these circumstances it would appear that the McNeils as individuals and not as employees of the Company were the recipients of whatever of good will flowed from this humane act. (P. 147).

It has been determined by decisions of the Supreme Court of the State of Arizona that mere negative testimony, with no proper accompanying and explanatory reasons in support thereof, is of no value as against positive evidence that a certain fact existed.

Davis vs. Boggs, 22 Ariz. 497, 199 Pac. 116;
So. Pac. Co. vs. Fisher, 35 Ariz. 87, 274 Pac. 779;
Ill. Bankers' Life Assn. v. Theodore, 44 Ariz. 160, 34 Pac. (2d) 423;
Canion vs. So. Pac. Co., (———Ariz. not yet reported), 80 Pac. (2d) 397.

In Canion vs. Southern Pacific Company, supra, the Court said:

"We have discussed the value of conflicting positive and negative testimony in the cases of Davis v. Boggs, supra, Southern Pacific Co. v. Fisher, supra, and Illinois Bankers' Life Ass'n v. Theodore, 44 Ariz. 160, 34 P. 2d 423, *and have held that mere negative testimony is not suf-*

ficient to prevail as against positive and unimpeached affirmative testimony.

It is urged by plaintiff that since the witnesses who testified as to the ringing of the bell were employees of defendant, their evidence is unworthy of credence, and should not be considered. *It is of course true that if there was a direct conflict in affirmative evidence between the witnesses, the jury would be entitled to take into consideration the interest of such witnesses, both for the plaintiff and for the defendant,* in the result of the case, but we think it is going too far to assume, as a matter of law, that all railroad engineers and firemen will commit willful and deliberate perjury merely because their employer has been sued and their testimony may affect the verdict. *In the present case, as we have pointed out, there is no real conflict in the evidence, for the one is negative and the other affirmative in its character, and all of the witnesses may have been, and doubtless were, testifying the literal truth.* Plaintiff's witnesses doubtless did not hear the bell rung, but this is not at all inconsistent with the fact testified to by defendant's witnesses that it actually did ring. Since there was no competent evidence to establish any acts on the part of defendant which, as a matter of law, would constitute negligence, the trial court properly instructed a verdict in favor of the defendant." (pp. 401-402).

Let us now apply the law as declared in the opinions of the Supreme Court of Arizona quoted herein to the evidence in the case. In doing so, we detail and analyze the evidence, oral and documental.

Appellees' Case in Chief.

Robert Walter Snedden was first called as a witness by appellees (106) and next Lucile Riggs (107). They were connected with the Motor Vehicle Division of the Arizona Highway Department and merely identified records of that department from which it appears that the International Truck and Semi-Trailer involved in the collision, and bearing license No. 46C1, was owned by, and registered in the name of, George B. Pace of Los Angeles, California, and that under a written lease the same was leased by George B. Pace to appellant. The lease was of the truck and trailer, including the driver or operator thereof. Appellant was authorized, as lessee of the truck and trailer, to use it in the conduct of its business as an interstate common carrier. Such is the full substance of the testimony of said witnesses and of Exhibits 1, 2, 3 and 4. (106-111).

Next, J. W. Gandee, Vice President of appellant and in charge of its business in Arizona, was called for cross-examination under the Arizona statute. (112). In substance, he testified that he was at the time of the collision acquainted with Joe Smith; that

> "he (Joe Smith) was not employed by defendant, Phoenix Blue Diamond Express, a corporation; he was employed by George B. Pace." (113). * * * * "The relation between George B. Pace and Phoenix Blue Diamond Express, a corporation, and the employment of Joe Smith was that George B. Pace was lessor and the company was lessee of said truck and semi-trailer.

The lessor of the truck and semi-trailer hired the driver, Joe Smith, with the approval of the company." (113).

George B. Pace was president of appellant. (113).

Joe Smith

"had been employed by Mr. Pace for about two years, driving one of Mr. Pace's trucks which, under a lease agreement between Pace and the company, was operated in the company's business and Smith, during his employment, had been taking his orders from the company." (114).

The drivers of trucks were never required to take any particular route in entering the City of Phoenix. At the time of the collision the truck was partially loaded with freight. (115). Four freight bills describing the freight were introduced in evidence as plaintiff's Exhibit No. 5. (117).

"The weigh bills, plaintiff's Exhibit 5 in evidence, were made out by E. B. Wilson, the company's agent at Tucson. They each showed Joe Smith as the driver of the truck, who received two copies of each." (117-118).

Joe Smith's

"compensation is paid by the lessor. Lessors are paid on a tonnage basis, depending on how much freight they haul and where it is hauled." (118). "I don't know whether the truck and semi-trailer I saw turned over on its side on East Washington Boulevard in the early morning

hours of January 1st, 1938, ever reached the company's place of business or docks in Phoenix. I know now that the truck with the freight on it was coming from Tucson to Phoenix. I don't know whether that truck ever reached the City of Phoenix on that trip." (118-119).

On redirect examination Gandee testified:

"Through Mr. Roberts, the company's office man in Phoenix, I gave instructions to E. B. Wilson, the company's agent in Tucson, on the afternoon of December 31st, 1937, as to what Smith should have done on the afternoon December 31st, 1937. I heard Roberts give the instructions in my presence. The instructions were given over long distance telephone from Phoenix to Tucson. The company's agent, E. B. Wilson, called the Phoenix office from Tucson and said he had a few empty containers, a very short load, and a small truck there. Wilson said the company's office was going to be closed Saturday and Sunday, Saturday being a holiday, and wanted to know if we needed the truck up here Saturday and Sunday. Mr. Roberts, who answered the telephone call, turned to me and asked for instructions on it and I told him to tell Wilson that the truck could not be loaded here before Monday morning, that our offices here were also closing on Saturday and Sunday and we didn't want the truck here before Monday morning. He so instructed Wilson." (121-122).

"The company's office in Phoenix was kept open only in daytime. Where trucks arrive in Phoenix at night and the office is closed, drivers are ordered to report the first thing the next

morning. There is no reporting at night. I stated drivers were instructed to stop either at the company's dock or at a service station when they arrive at nighttime in Phoenix; on December 31st, 1937, the service station at which they were directed to stop was the Market Service Station at 4th Street and Madison in Phoenix." (122).

Dick Lee was called as a witness by appellees (124), as was Horace Moore (126). Their testimony only related to the identification of the truck and trailer, which was admitted.

Such was all of the evidence of appellees upon the question of agency and scope of employment. We concluded that such evidence established only that G. B. Pace was the owner of the truck and trailer involved in the collision; that he hired and paid Joe Smith to drive the truck and leased the truck and trailer to appellant with the driver furnished; that the truck and trailer was leased, to be used in the common carrier business of appellant and that the collision occurred on a highway usually travelled by appellant in conducting its business and the truck and trailer was partially loaded with freight being transported in interstate commerce by appellant.

Appellant's Case on the Issue of Agency and Scope of Employment.

Joe Smith, called as a witness for appellant, testified:

"On the night of December 31st, 1937, I drove an International truck and trailer, bearing li-

> cense No. 46C1, from Tucson into Phoenix. After leaving Tucson, driving the truck, I first stopped at Third and Madison Street in Phoenix, Arizona, and parked the truck heading east on Madison Street between 3d and 4th." (127). * * * * "I regularly parked or left the truck at the dock or the Market Service Station. I had been instructed by Mr. Pace or Mr. Gandee to park the truck at one or the other of those two places." (127).

Smith then details leaving the truck and going to the Ritz Cafe and having several drinks alone and there meeting several fellows, it being about a quarter after eleven or 11:30 when he parked the truck on Madison. (127-128). He then testified to leaving the Ritz Cafe with Cal Hollis and several other fellows whose names he did not know. He testified:

> "When I went back to the truck I got in the sleeper compartment. It is a compartment built in behind the driver's seat, or sleeper. A fellow driving sleeps in it. When we got to the truck they all started arguing who was going to drive the truck and I got in the sleeper. The truck was moved from the place on Madison Street, where I had parked it. I did not move the truck or drive it away. I don't know who did." (128).

The witness then testified that the truck was moved to the Gateway, another drinking place once known as the Old Red Rooster en route to Washington Tavern.

> "All of the others got out of the truck and went into the Red Rooster; I did not get out, I

stayed in the sleeper; I don't know how long they were gone, I was sleeping most of the time." (128).

The witness then testified to the truck being driven to the Washington Tavern, where the occupants got out.

"I stayed in the sleeper a few minutes and decided I'd get out and get a drink myself and I did. I was in the Washington Tavern fifteen or twenty minutes or a half hour, I do not know the exact time; then I went back in the sleeper in the truck and went to sleep. * * * * I remember the truck starting up again. I do not know which way it went. The next thing I knew was when the truck was turning over. I had not at any time, after parking the truck at 3d and Madison Street, driven it prior to the wreck. I was not driving the truck at the time of the wreck; I do not know who was driving it, I was drunk." (129).

On cross-examination by counsel of appellees, the witness adhered in all substantial respects to his testimony in chief but testified:

"I did not, under my authority to employ anyone to drive a truck for any purpose, request anyone of those gentlemen to drive the truck for me because I was so tired or intoxicated that I could not operate it myself. It was not understood among us gentlemen that some one other than I would drive the truck out on this party. I don't know whether it was understood among the others or not. I left the keys in the ignition

when I left the truck parked on the street and it was in this way that the driver of the truck got the keys to operate it." (135).

Speaking with reference to the time of the collision, Joe Smith further testified:

"When the truck hit the ground, it threw me half way out of the sleeper at the end of the driver's seat." (139).

On redirect examination Joe Smith testified:

"In leaving my truck parked on Madison Street between 3d and 4th and going into the Ritz and getting some liquor to drink and in the movements thereafter with the truck to the Gateway or the Old Red Rooster and out to the Washington Tavern, on that trip I was not on any business of either Mr. Pace or the Phoenix Blue Diamond. Mr. Pace and Mr. Gandee instructed all their drivers never to drink while they were on duty. I was so instructed." (141).

Joe Smith was recalled as a witness by appellees and asked certain impeaching questions respecting his acquaintance with and statements to one Harry Davis.

William J. Evans was then called as a witness on behalf of appellant and corroborated the statements of Joe Smith as respects his being at the Ritz and going by truck from 3d and Madison Street to the Gateway, and that Joe Smith did not drive the truck. (143-147).

Calvin Hollis, a witness called in behalf of appellants, corroborated the testimony of Joe Smith that he was in the Ritz Cafe before midnight on December 31st, 1937.

J. W. Gandee was again recalled and testified in behalf of appellant:

> "The defendant, Phoenix Blue Diamond Express, does not haul any freight from one point to another point wholly within the State of Arizona. It is an interstate carrier only. Anything that is picked up in the State of Arizona must be delivered outside the State of Arizona, and any deliveries made within the State of Arizona is freight picked up outside Arizona." (150).

M. C. Weaver, called as a witness in behalf of appellant, testified that he was the proprietor of Washington Tavern on December 31st, 1937, and was not then acquainted with Joe Smith but that he saw in his Tavern that night a man he has since known to be Joe Smith. Two other persons were with him. On cross-examination he fixed the time of first seeing Joe Smith at the Tavern as sometime after twelve o'clock. He testified he knew one of the boys named Spike and that he told him he would have to stay off the dance floor and away from the orchestra. (150-152). Further, on cross-examination, he testified:

> "They were there until after one o'clock in the morning of January 1st. Several times I noticed, when I looked out or walked outside, a large truck with a box car arrangement on the back.

It was parked on the north side of Washington Street, opposite my Tavern, facing west. I did not observe any other truck there that night. I did not observe any truck parked to the south curb right by my premises." (152-153).

Dorothy Weaver, wife of M. C. Weaver, proprietor of the Washington Tavern, being called as a witness in behalf of appellant, testified that she was at the Washington Tavern during the evening of December 31st, 1937. That around midnight she saw Joe Smith and two other fellows come through the front door into the Tavern. On cross-examination she testified that she did not think either of the three men were in the Tavern before midnight but that they could have been and she didn't see them, stating:

"I am positive the first time I saw Joe Smith there was at midnight or shortly after. I didn't say he could not have been there any earlier but that is the first time I saw him." (154).

With the foregoing testimony, appellant rested upon the issue of agency and scope of employment.

Appellees called in rebuttal one Harry Davis, who contradicted the testimony of Joe Smith in some respects. He testified that he arrived at Washington Tavern about one o'clock A. M. on the morning of January 1st, 1938, and at the time of his arrival saw a Phoenix Blue Diamond Express truck

"parked on the north side of Washington Boulevard, headed west toward Phoenix, across the boulevard from the Washington Tavern, which

is on the south side of the boulevard. I went to that truck that night and walked around it. The sleeper door on the truck was partially open and I am sure I saw Joe Smith lying in it. I tried to get him out. I tried to wake him up. I said, 'Come on, Joe, I will buy you a drink', and no answer. I hollered at him a few more times and he would just mumble something about a dock. I had gone to the Tavern to get a drink and finally Bob Brazee, the fellow with me, said, 'Let's go, he is all right, let him alone', so we left the truck then and went to the Tavern and it was too late to get a drink." (156).

Witness Harry Davis further testified that Joe Smith on either the 14th, 15th or 16th day of January, 1938, at about the hour of 11:30 o'clock in the morning, on the premises of Brazee's Service Station, no one else being present, stated:

" 'I had driven from L. A. to Tucson and then up here and was about twenty-five hours on the road without any rest, and when I reached the Washington Tavern on my way in, I was so damn near all in that I thought I would stop and get a shot and see if any of the boys were around and help me in with the truck', or words to that effect. He also in that same conversation stated to me, 'I met some of the fellows in there, had a few drinks and they were not ready to go so I went out and crawled in the sleeper and told them when they were ready to come on out.' " (157).

On cross-examination appellant's view is that the veracity of appellees' witness Davis was adversely affected.

At this stage of the proceedings appellant was permitted to reopen its case and called Alex Brady as a witness. He testified that he operated the Ritz Cafe on December 31st, 1937; that during the evening he saw Joe Smith in his place of business; that a couple of other boys were there with him. On cross-examination he testified:

> "I am pretty sure it was not later than eleven o'clock that Joe Smith came to the Ritz." (161-163).

The testimony of this witness did not coincide exactly with that of other witnesses as to details to time of arrival and departure and as to whether the individuals left alone or together.

Appellees called Garnet Williams, who testified that she arrived at the Washington Tavern between 8:30 and nine o'clock December 31st, 1937, and remained there continuously until about a quarter of two A. M. in the morning of January 1st, 1938; that she met there by appointment friends by the name of Dick Lee and Mr. Kelsey between 11:30 and a quarter of twelve December 31st, 1937, and that on the evening before she met her friends a man named Spike Steffins, between eleven and 11:30, asked her to dance with him and she told him that she did not have a dance for him. Upon the arrival of her friends she advised them of the

incident and thus fixed the hour when she said she saw Spike Steffins at the Washington Tavern. (164).

Dick Lee was then called as a witness by appellees and testified to having arrived at the Washington Tavern between 11:30 and twelve o'clock, probably a quarter of twelve, with Mr. Kelsey, and that a man by the name of Spike Steffins was pointed out to them by Garnet Williams soon after their arrival. (165).

Joe Smith (166) and J. W. Gandee (167) were recalled in sur rebuttal. Their testimony on this issue appears unimportant.

Such, then, is all of the evidence upon the issue of agency and scope of employment. Should a verdict have been directed for appellant? We urge that a verdict should have been directed. All of the affirmative evidence is to the effect that Joe Smith drove the truck involved in the collision past Washington Tavern en route from Tucson to Phoenix, Arizona, and to Madison Street between 3d and 4th before ever stopping the truck after leaving Tucson. At best, the only evidence to contradict the positive testimony of this fact is negative in nature. Was the evidence such that it could be disregarded by the Court or jury? We think not. Under the decisions of the Arizona Supreme Court, if Joe Smith, after driving the truck into Phoenix took it back out to Washington Tavern or permitted another to do so he had departed from his duties to the appellant and was upon a New Year's celebration of his own. The

Court recognized this situation and instructed the jury in substance that if Joe Smith first brought the truck to 3d and Madison Street in Phoenix, Arizona, and thereafter it was driven to Washington Tavern by Joe Smith or anyone else, the appellant was not liable. (176-177). We urge that the Court should have decided the question in favor of appellant and should have directed a verdict in its favor. Negative testimony does not establish a conflict in the evi-. dence. It is apparent that the trial judge gave to negative testimony a factual value not permitted under the Arizona decisions.

The successful impeachment of a witness only has the effect of leaving the case in the condition that it would be in if such witness had not testified at all. Such is the law of the State of Arizona. It cannot be successfully contended that all of the witnesses for appellant were impeached if indeed it should be concluded that some of the witnesses of appellant had been impeached.

All of the evidence on the subject of agency and scope of employment is found in the transcript of record, pages 112 to 167, and appellant urges that a fair consideration of the whole thereof can lead but to one conclusion, and that is, that there is no legal liability on the part of the appellant and that the trial judge erred in not directing a verdict in favor of appellant.

SPECIFICATION OF ERRORS NO. III

Assignment of Errors No. 5, (98-99).

The Court erred in refusing to give an instruction requested by defendant, as follows:

> 'You are instructed that no fact or circumstances nor any testimony tending in any degree to impeach Joe Smith, provides any positive evidence at all against defendant. Such impeaching evidence neither establishes nor tends to establish any fact in this case but its only effect may be to impeach or destroy the testimony of Joe Smith. In other words, its only effect was on the credibility of the testimony of Joe Smith and at most, it only entitled you to wholly disregard the affirmative testimony of Joe Smith but would not authorize you to consider impeachment evidence as affirmative evidence that Joe Smith was at the time of the accident using and operating the truck involved in the accident in the business of defendant. The greatest possible effect of impeachment evidence could have so far as defendant is concerned was to leave the case just exactly as though Joe Smith had not testified. Otero vs. Soto, 267 Pac. 947; 34 Ariz. 87.' Or any other like instruction."

Appellees offered no affirmative evidence to prove agency or operation of the truck within the scope of the employment of Joe Smith. Their case rests alone upon presumption arising from proof that appellant was the lessee of the truck in ques-

tion. It is true that some evidence was introduced designed to affect the credibility of Joe Smith, and to impeach his testimony. Even trained lawyers have frequently fallen into the error of giving to impeachment evidence or negative evidence, value in establishing a controversial fact. The decided and quoted cases in this brief are illustrative. If learned lawyers and judges so err, it is more likely that the untrained juror will likewise err. It is therefore right that an instruction, such as the one requested, should have been given to the jury by the trial Court, and the failure upon appellant's request is prejudicial error. In submitting a case to the jury it should be made clear to them, by an appropriate instruction, that, as said in Otero vs. Soto, supra:

> "The impeachment of a witness only serves one purpose, and that is to enable the jury to properly evaluate the credibility of the witness. Under no circumstances can it add anything of *affirmative* value to the case of the adversary." (P. 94).

Ought not this case, in any event, be reversed because of the Court's failure to give the requested instruction under discussion? We urge a reversal.

SPECIFICATION OF ERRORS NO. IV

Assignment of Errors No. 6 (99).

> The Court erred in not answering the question asked the Court by Juror Ford: In case the jury finds that that truck was driven

by anyone other than Joe Smith, what would be your instructions as to the liability of the defendant?''

The question of Juror Ford was a plain and simple question. It was a question pertinent to the issues tried. It was a question which, if answered in the negative, would necessarily have been decisive. It will not be argued, we venture to assert, that if a person other than Joe Smith was driving the truck at the time of the accident, there was any liability upon appellant. The wisdom and justification for the question asked by Juror Ford is apparent from the instructions of the Court to the jury. The jury was instructed in effect that the liability of the appellant existed only in the event Joe Smith was driving the truck at the time of the collision, and the truck had not first been driven into Phoenix. It is evident that Juror Ford was not clear as to whether or not there could be liability upon appellant if Joe Smith was not driving the truck. It was, we urge, incumbent upon the trial Judge to answer the question of Juror Ford. If we understand the law applicable to the facts established in the trial, Juror Ford should have been told, in answer to his question, that if the truck was driven by anyone other than Joe Smith appellant was not liable. Instead of answering the Juror's question, the Court instructed Juror Ford:

''The Court: Well, you take that up with the other jurors.'' (182).

The Court further advised Juror Ford:

> "You haven't found anything yet. Wait until you get in your jury room." (182).

And finally, the Court queried Juror Ford:

> "How do you know that the jury will find that?"

Appellant was entitled, as a matter of right, to have Juror Ford advised what the law was, in answer to his question. Certainly it is not proper that a juror, in doubt as to what the Court had instructed the jury, be by the court committed to the other jurors for advice and instruction on a question of law. No one can tell what the other jurors said to or advised Juror Ford, if he followed the Court's direction and took his question up with them. Maybe they also misunderstood the Court; for maybe they did not understand the Court at all. Maybe one of them had one idea, and maybe another of the jurors had a different idea. Especially is the failure of the Court to answer the question of Juror Ford 'in case the jury finds that the truck was driven by any other than Joe Smith, what would be your instruction as to the liability of the defendant?' (182). Prejudicial under the evidence upon the question of agency and scope of employment, and in view of the fact that no witness testified that Joe Smith was driving the truck at the time of the collision.

We respectfully submit that the District Court should have directed a verdict in favor of appellant, and that this Court should reverse the case and direct entry of judgment for appellant. If it should be determined, however, that appellant is not entitled to a directed verdict, it is respectfully urged that the case should be reversed and a new trial directed.

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